In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-704

JAMES ARTHUR JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of selling counterfeit currency, in violation of 18 U.S.C. 473, and of conspiring to sell such currency, in violation of 18 U.S.C. 371.[1] He was sentenced to two concurrent five year terms of imprisonment. The court of appeals affirmed (Pet. App. B).

1. The evidence is detailed in the opinion below. It showed that secret service agent Daniel Marchitello, with the assistance of an informant, Edward Callahan, purchased a quantity of counterfeit currency from petitioner and his two co-defendants.

[1] One of petitioner's co-defendants was also found guilty on both counts; another was convicted on the conspiracy charge only.

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Callahan, who was by then in prison (Tr. I 24), was not called as a witness by the government; the government's case was principally based upon the testimony of Marchitello. The United States Attorney disclosed to petitioner one month before the trial and again on the day trial began that Callahan would not be used as a prosecution witness (Tr. I 6–7). Petitioner did not seek to call the informer as a hostile witness, although the trial judge indicated a willingness to have him produced if petitioner so desired (Tr. V 7–8). During cross-examination, prosecution witnesses—particularly Marchitello—were frequently asked if Callahan would be called to the stand, what his past record was, where he was then located, and whether any promises had been made to him in return for his services (Tr. I 23–24, 106–109, 127–128, 134; Tr. II 27–30, 40, 58–59, 63–64). During closing arguments, all three defense counsel commented on Callahan's absence. Petitioner's attorney stated: "The only person who hasn't come forth at this trial is Mr. Callahan. Mr. Callahan, he alone could corroborate what the agent said, but he is not here. I know why he isn't here. I assume I know why he isn't here. It is up to you to make whatever assumptions you wish to make from the evidence" (Tr. IV 11). At the prosecution's request, the trial judge instructed the jury that the defense had the right to subpoena Callahan as a witness, and specifically left it up to the jury to draw what inferences they wished from his absence. At the same time, the judge emphasized that the de-

fendant had no duty to present any evidence, while the government was required to prove its case beyond a reasonable doubt.[2]

Petitioner argues that in giving this instruction the court committed prejudicial error. The court below, however, properly rejected this contention. If a party has it peculiarly within his power to produce a witness whose testimony would be highly relevant, and fails to do so, the inference naturally arises that the testimony of the individual would be unfavorable to that party. *Graves* v. *United States,* 150 U.S. 118, 121. See also McCormick, *Evidence* 534; II Wigmore, *Evidence* 285 (3rd ed.). However, if a witness is equally available to both sides, courts hold either that no

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[2] The trial court's full instruction in this regard is as follows:

During the course of the trial there has been some mention of an alleged informer by the name of Callahan. The defendants' counsel have argued to you that the jury should draw an inference from his absence that his testimony would be unfavorable to the Government. There is evidence that Mr. Callahan is currently in jail. I would, however, point out to the Jury that each of the defendants would have a right, as does the government, to compel or to ask the Court to compel the presence of Callahan as a defense witness. In other words, the defendants, as well as the government, have the right to compulsory process to obtain the presence of witnesses.

I will leave it to you, having pointed this out, to draw such inferences as you wish, if any, as to what the absence of this witness shows or does not show with relation to the government's case.

I would emphasize, however, that the defendants have no duty to present any evidence and the government has the duty of proving the case beyond a reasonable doubt [Tr. V 33-34].

inference arises [3] or that the failure to produce is open to an inference against either party.[4] There is an apparent difference among the circuits as to whether informants and police agents, although physically accessible to both sides as potential witnesses, are for these purposes equally available to both sides, or whether they are "peculiarly within the power" of the prosecution whose failure to produce them gives rise to the inference that their testimony would be unfavorable to the prosecution.[5]

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[3] See *United States* v. *Currier*, 454 F. 2d 835 (C.A. 1); *United States* v. *Meisch*, 370 F. 2d 768 (C.A. 3); *United States* v. *Chase*, 372 F. 2d 453 (C.A. 4); *United States* v. *Chapman*, 435 F. 2d 1245 (C.A. 5); *United States* v. *Waller*, 422 F. 2d 1202 (C.A. 7); *Johnson* v. *United States*, 291 F. 2d 150 (C.A. 8); *Arellanes* v. *United States*, 302 F. 2d 603 (C.A. 9).

[4] See *United States* v. *Deutsch*, 451 F. 2d 98 (C.A. 2).

[5] Some courts indicate that the legal availability of a witness depends upon his disposition and relationship to the parties and thus consider informants and police agents not to be equally available to the defense even though they are physically accessible. See *United States* v. *Jackson*, 257 F. 2d 41 (C.A. 3); *Burgess* v. *United States*, 440 F. 2d 226 (C.A. D.C.); *Morei* v. *United States*, 127 F. 2d 827 (C.A. 6). Others perceive such individuals to be available to either side if they are physically accessible to subpoena. See *United States* v. *Tant*, 412 F. 2d 840 (C.A. 5); *Margoles* v. *United States*, 402 F. 2d 450 (C.A. 7); *United States* v. *Waller*, 422 F. 2d 1202 (C.A. 7); *Arellanes* v. *United States*, 302 F. 2d 603 (C.A. 9).

Although the language in these cases is certainly inconsistent, the varying factual and procedural contexts in which the question arises may account for much of this inconsistency. Thus, in the *Waller* case, the informant was present at trial, and had indicated his readiness to take the stand if called by the defendant. In *Arellanes* and *Margoles* the defendants apparently were urging the courts to permit the inference—which, on far different facts, the court in *Morei* apparently did. *Tant* rests primarily on the fact that the absent informant's testimony would have been cumulative. In the *Burgess* case the question is thoroughly considered; Judge

However, this is not an appropriate case in which to resolve any differences which may exist among the lower courts concerning the application of the missing witness rule, for the court of appeals here stated its approval of the rule advocated by petitioner. The court below stated that:

> * * * A witness's availability is not to be decided on the basis of his physical presence in the courtroom or his accessability by writ of habeas corpus or by subpoena. We hold rather a witness's practical and legal availability is to be determined on the basis of his disposition and relationship toward the parties [citations omitted]. Where the court finds that an uncalled witness is clearly favorably disposed toward one of the parties, an instruction, if requested, may properly be given that the jury may draw an inference favorable to the other party [Pet. App. B 19].

This interpretation is more favorable to a defendant than the opposing view which defines availability merely on the basis of physical accessibility and which, in petitioner's case, would give rise either to no inference or would be open to an inference against either party.

The only real issue that petitioner can raise is whether the court below properly decided that in the particular circumstances of this case, "[w]hile a more appropriate instruction would have spelled out Callahan's disposition toward the defense, * * * we find

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Fahy concludes that the trial court must initially determine from all the facts of the case whether the absent witness was so important to the prosecution's case that the inference would be reasonable. If so, the court should instruct the jury that they have the right to draw the adverse inference.

the court's instruction to have been a neutral one which did not vitiate defense counsel's missing witness argument to an extent substantial enough to constitute reversible error" (Pet. App. B 20). Petitioner, it should be emphasized, did not request an instruction that would have more expressly clarified to the jury Callahan's relationship to the government.[6] Moreover, during trial the court gave all three defense counsel free rein to refer adversely to Callahan's absence and, in closing argument, it did not interfere with the exhortation of a co-defendant's attorney that the jury should infer that the absence indicated that Callahan would have testified unfavorably to the government.[7] In these circumstances, the court below correctly concluded that no reversible error was committed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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[6] See Tr. V 2–8, where, after the trial court indicated that it would accept the government's supplemental instruction on the defendants' right to subpoena Callahan, the only objection was raised by one of the co-defendant's attorneys who requested that the court add to the supplemental instruction the caveat that the government still had to prove defendants' guilt beyond a reasonable doubt and that the defense was under no obligation to produce any evidence. This was accepted by the court (Tr. V 33–34).

[7] The petitioner's reliance on *United States* v. *Jackson*, 257 F. 2d 41 (C.A. 3), and *Morei* v. *United States*, 127 F. 2d 827 (C.A. 6), is misplaced. Neither of those cases involved a challenge to a jury instruction. In *Morei*, the court reversed because of entrapment, and in analyzing the evidence, cited the inference as an aid to its own determination. In *Jackson*, the defense was denied the right to argue the inference to the jury.

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